Supreme Court, U.S.
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No. 01-1189

IN THE

SUPREME COURT OF THE UNITED STATES

KARIN BRANDENBURG,
Petitioner,

versus

COMMONWEALTH OF KENTUCKY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether KRS §532.110(2) Prohibits the Trial Court Judge From Increasing the Petitioner's Jury Sentence From 1.5 Months to Serve to 1 Year to Serve.

2. Whether the Imposition of $26,380 in Fines Is Excessive and in Violation of KRS §534.040(2), Amendment VIII of the United States Constitution, and Section 17 of the Kentucky Constitution.

LIST OF PARTIES

The caption of the case provides the names of all the parties to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Karin Brandenburg, respectfully prays that a writ of certiorari issue to review the order of the Kentucky Supreme Court denying discretionary review of the decision of the Court of Appeals of the Commonwealth of Kentucky which affirmed the opinion the Hardin Circuit Court of the Commonwealth of Kentucky, affirming the sentence imposed by the Hardin District Court of the Commonwealth of Kentucky, which interpreted a jury sentence of 1.5 months per count to be consecutive but capped at 12 months, rather than interpreting the 1.5 months per count to be concurrent where there was no consecutive versus concurrent jury instruction given.

STATEMENT OF JURISDICTION

On November 14, 2001, the Supreme Court of Kentucky, case number 01-SC-0463-D, denied discretionary review of the decision of the Kentucky Court of Appeals. A copy of that

order is attached hereto as Appendix A. On May 11, 2001, on discretionary review, the Kentucky Court of Appeals, case number 99-CA-000121-DG, affirmed the order of the Hardin Circuit Court of the Commonwealth of Kentucky. A copy of that order is attached hereto as Appendix B. On December 15, 1998, the Hardin Circuit Court of the Commonwealth of Kentucky entered an order affirming the sentence imposed by the Hardin District Court. A copy of that order is attached hereto as Appendix C. On or about April 10, 1998, and by amended order on April 13, 1998, the Hardin District Court imposed the ambiguous sentence returned by the jury. Copies of these orders are attached hereto as Exhibits D, E, and F respectively.

The jurisdiction of the Supreme Court of the United States is conferred by 28 U.S.C. 1257(3) and Rule 13(1) et seq. of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution, which provides in pertinent part as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

A. Material Facts

Karin Brandenburg, hereinafter Petitioner, was convicted of numerous misdemeanors and violations following a jury trial on March 26 and March 27, 1998 in Hardin District Court, Radcliff Division, the Honorable Kimberly Shumate, Judge. The Petitioner was convicted of fifty-six (56) counts of cruelty to animals in the second degree, sentenced to 1.5 months per count (eighty-four (84) months), and assessed a fine of $11,200; sixty-six (66) counts of failure to license dogs and assessed a fine of $3,300; sixty-six (66) counts of failure to vaccinate dogs and assessed a fine of $5,280; and two hundred sixty-four (264) counts of failure to obtain a city

business license and assessed a fine of $5,280. The total amount of the fines assessed to the Petitioner are $26,380. Additionally, the trial court imposed a twelve (12) month jail sentence.

The Petitioner filed a timely notice of appeal of the March 27, 1998 conviction on April 3, 1998, divesting the trial court of further jurisdiction. However, the trial court entered Findings of Fact and Conclusions of Law and a Sentencing Order on April 10, 1998. In the April 10, 1998 Order, the trial court further scheduled a hearing for April 27, 1998 regarding forfeiture and restitution, which was not litigated in the Petitioner's trial, but addressed for the first time on motion by the Commonwealth. The trial court, on its own Motion, entered an Amended Sentencing Order on April 13, 1998, which altered the April 10, 1998 Order only to the extent that the Amended Order specifically designated the Order entered on April 10, 1998 as "final and appealable." An appeal from this Order was filed by the Petitioner on April 20 1998. On April 20, 1998, the Petitioner filed a Motion to Alter, Amend or Vacate the sentence with the trial court. The appellate court, Hardin Circuit Court, consolidated all appeals in an Order entered on May 12, 1998. The Circuit Court issued a written Opinion and entered an Order Affirming the trial court on December 15, 1998.

B. Questions of Law Presented for Review:

I. WHETHER KRS §532.110(2) PROHIBITS THE TRIAL COURT JUDGE FROM INCREASING THE PETITIONER'S JURY SENTENCE FROM 1.5 MONTHS TO SERVE TO 1 YEAR TO SERVE.

The jury found the Petitioner "guilty" of fifty-six (56) counts of cruelty to animals in the second degree. The jury fixed the Petitioner's punishment as "1.5 months per count for a total of 84 months. . . ." From the verdict form, it is clear that the jury intended to sentence the Petitioner to eighty-four months in the county jail, which is clearly in violation of

KRS §532.110(1)(b), which provides for a maximum of one (1) year imprisonment for consecutive definite (misdemeanor) terms. KRS §532.110(1)(b) provides that the "aggregate of consecutive definite terms shall not exceed one (1) year;. . . ." And, KRS §532.110(2) further provides:

> If the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence which the defendant must serve.

The jury was not instructed, and its verdict did not provide whether the 1.5 month sentence per count was to be served consecutively or concurrently. The Court of Appeals of Kentucky erred in its finding that "Post-trial, Brandenburg filed a motion requesting that the court amend her 84 month jail sentence to twelve months to conform with the one year cap on aggregate misdemeanor sentences under KRS 532.110(b)." Petitioner filed a post-trial motion for the sentences to be served concurrently, noting that one year was the cap on aggregate misdemenaor sentences. At no time did Petitioner request the trial court to amend her sentence to twelve months. KRS §532.110(2) clearly requires that the 1.5 month sentence per count be served concurrently. This interpretation is supported by the Commentary to KRS §532.110:

> Pursuant to subsection (2), if there is no designation as to the manner in which the sentences are to run, ***they must run concurrently***.

The Kentucky Court of Appeals addressed the issue of the erroneous jury instructions, wherein trial counsel did not follow the procedure outlined in RCr 9.54(2) to preserve the question of improper jury instructions for appellate review, under the palpable error rule of RCr 10.26. The Honorable Court of Appeals erred in attempting to distinguish the case at bar from *Stoker, supra*, when in fact the cases are near identical on this issue. The Court erred in finding that a manifest injustice has not resulted in the

construction of these instructions. There is indeed a substantial probability the result would have been different. Further, Petitioner submits that even if prior trial counsel failed to object to the proposed instructions and did not tender alternative instructions, the failure to object or request a recommendation that the jury be instructed on consecutive versus concurrent sentencing does not validate an otherwise illegal sentence.

The trial court finding that "the oral admonition of the jury following the question of the foreman regarding the issue of penalty satisfies any request of the jury for recommendation" is clearly erroneous and an abuse of discretion. The admonition that the trial court gave to the jury is that the Petitioner could receive up to a year in the county jail for each count fails to instruct the jury with respect to consecutive or concurrent sentences, and that regardless of the number of misdemeanor convictions, the maximum sentence that it could impose was still one (1) year pursuant to KRS §532.110(1)(b).

The Petitioner relies upon RCr 9.84 which provides that when the jury returns a verdict of guilty, it shall fix the degree of the offense and the penalty. Moreover, the Commentary to KRS §532.090 provides that it is contemplated that the jury will assess the penalty in cases tried before a jury. The record clearly indicates that in the calendar order entered on March 27, 1998 at the conclusion of the trial after a verdict of guilty, the sentence was set forth as follows: "Sentence 1.5 months for 84 months total of 56 counts." The trial court orally reserved jurisdiction to "review the sentence" on post-trial motions regarding consecutive versus concurrent sentencing. However, KRS §532.110(1) requires that the trial court make a determination of concurrent versus consecutive at the time sentence is imposed and does not give the trial court discretion to later determine the issue of concurrent or consecutive sentencing. In this particular case, given the

misdemeanor charges, it is the jury who determines and imposes sentence, which they did at the return of their verdict. The Court of Appeals erred in finding that the calendar entry which states "jury finding Sentence 1.5 months for 84 months total of 56 counts Cruelty 2d" was merely a notation of the sentence imposed, not that the court had actually imposed sentence on March 27, 1999 (sic). The Court of Appeals further erred in finding that the "trial court did not fail to specify whether Brandenburg's sentences were to run concurrently or consecutively; rather the trial court merely reserved its ruling on the issue. The Honorable Court of Appeals mistakenly predicates the concurrent vs. consecutive issue as being within the province of the trial court when in all actuality it is solely within the province of the jury. The jury determines the sentence, hence, the jury must determine the concurrent or consecutive issue.

The Petitioner submits that sentence was imposed on March 27, 1998, and that the trial court was without statutory or common law authority to reserve "final sentencing" until April 8, 1998. There is no provision for "final sentencing" in a misdemeanor case because the jury imposes punishment. (See KRS §534.040 and the Commentary thereto). Since neither the jury nor the trial court indicated whether the sentence of 1.5 months per count was to be served consecutively or concurrently, KRS §532.110(1) and (2) require that the sentences shall run concurrently. The Supreme Court held in *Stoker* v. *Commonwealth*, Ky., 828 S.W.2d 619 (1992), that where jury instructions do not advise the jury that some offenses may run concurrently and others consecutively, the judgment must be vacated and a new judgment entered ordering a *concurrent sentence*.

Although *Stoker* addresses the "truth in sentencing" statute (KRS §532.055), the Court specifically addressed the applicability of KRS §532.110 and the principle that "consecutive sentences should not be permitted to accumu-

late endlessly." *Stoker*, 828 S.W.2d at 627, *quoting*, Commentary to KRS §532.110. Hence, the rationale of *Stoker* is applicable to both felony and to misdemeanor sentencing. As a result, the only appropriate and lawful sentence in this case is 1.5 months for each of the fifty-six counts, to be served concurrently, for a total of 1.5 months to serve. The imposition of a sentence of twelve (12) months to serve is clearly in violation of Kentucky law, and contrary to the holding in *Stoker*.

Therefore, because the imposition of consecutive sentences of 1.5 months for each count for a total of 84 months violates the statutory law of the Commonwealth and the holding of *Stoker*, and because the trial court increased the jury's sentence to twelve (12) months in jail, the sentence must be vacated and remanded with instructions to enter an order sentencing the Petitioner to 1.5 months on each conviction to be served concurrently.

II. THE APPELLATE COURT ERRED IN AFFIRMING THE IMPOSITION OF EXCESSIVE FINES IN VIOLATION OF KRS §534.040(2), AMENDMENT VIII OF THE UNITED STATES CONSTITUTION, AND SECTION 17 OF THE KENTUCKY CONSTITUTION.

The jury assessed a total of $26,380 in fines to the Petitioner as follows:

1. 56 counts of cruelty to animals in the second degree: $11,200
2. 66 counts of failure to license dogs: $3,300
3. 66 counts of failure to vaccinate dogs: $6,600
4. 264 counts of failure to obtain a city business license: $5,280

The fines imposed by the jury and upheld by the trial, circuit and Court of Appeals are excessive and violative of KRS §534.040 which limits a misdemeanor fine to $500, Amendment VIII of the United States Constitution, and

Section Seventeen of the Kentucky Constitution which prohibit excessive fines. While the Court of Appeals is technically correct that KRS 534.030(3) does not impose a cap on the aggregate of misdemeanor fines, penalties which are manifestly excessive and cruel, and which shock the moral sense of the community are violative of the prohibition on excessive fines. *Workman* v. *Commonwealth*, Ky., 429 S.W.2d 374 (1968). Section 17 of the Kentucky Constitution and the Eighth Amendment to the United States Constitution are "directed to both the legislature and the judiciary." *Weber* v. *Commonwealth*, Ky., 196 S.W.2d 465, 469 (1946).

The Court of Appeals affirmed the circuit court holding that imposition of fines equaling $26, 380 and jail time of eighty-four (84) months (about seven years) did not shock the moral sense of the community. In *United States* v. *Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028 (1998), the United States Supreme Court held that a fine or "punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the defendant's offense." "[E]xcessive verdicts, apparently given under the influence of passion or prejudice, will be set aside." *Weber,* 196 S.W.2d at 470.

In this case, the Petitioner was convicted of misdemeanor violations, the maximum fine for which is $500. KRS §534.040(2)(a). Hence, a fine in excess of twenty-six thousand dollars is in fact, and on its face, "grossly disproportional to the gravity" of this Petitioner's offense. It is settled that the maximum jail time which may be imposed on any misdemeanant, regardless of the number of misdemeanor convictions whether two or two hundred, is twelve (12) months in the county jail. The Court of Appeals opined that even though the aggregate sentences for misdemeanor violations cannot exceed the statutory limitation of twelve months, the imposition of aggregate

fines is not so limited. This reasoning defies all logic. For example, where a fine is imposed on a convicted felon in place of a prison sentence, that fine is limited to a maximum amount of $10,000 (or twice his gain realized whichever is greater) regardless of the actual number of felony convictions. KRS §534.030(3). However, according to the logic of the Circuit Court, the aggregate amount of fines for misdemeanor convictions can and does exceed even the legal limits of fines imposed on felony offenders. In applying the reasoning of the trial, circuit and Court of Appeals, had the jury chosen to impose the maximum of $500 per misdemeanor conviction, the aggregate fine for the fifty-six (56) counts of cruelty to animals in the second degree would have been $28,000 for those violations alone. If she were convicted of numerous felonies and fined, the Petitioner's total aggregate fine could not exceed $10,000. Therefore, the Court's interpretation of KRS §534.040(2)(a) as a limitation only on the amount *per misdemeanor conviction* and not on the aggregate amount of fines for numerous misdemeanor convictions imposes a punishment on the Petitioner that is "grossly disproportional to the gravity" of the offenses and grossly unfair for the offenses for which she was convicted, as well as contrary to a common sense interpretation of the misdemeanor statute.

The "rule of lenity" is alive and well in the Commonwealth. In *Commonwealth* v. *Lundergan*, Ky., 847 S.W.2d 729, 731 (1993), the Supreme Court stated:

> Kentucky case law has long recognized that when there is an ambiguity or conflict in a penal statute, the "rule of lenity" is applicable. . . . [D]oubts about the meaning of a penal statute should be resolved: in favor of lenity and against a construction that would produce extremely harsh or incongruous results or impose punishment totally disproportionate to the gravity of the offenses.

The Circuit Court relied on the fact that the Legislature did not expressly limit the aggregate amount of misdemeanor fines in KRS §534.040 as evidence that the Court has virtually unlimited discretion in assessing fines to a misdemeanant. The Circuit Court and the trial court ignored the plain language of the statute which limits the fine for misdemeanors to $500. Further, Petitioner contends that the court is in fact restricted by the United States Constitution, Amendment VIII, the Kentucky Constitution, Section Seventeen, and by KRS §534.040, in its determination of the amount of fines that may be imposed on a defendant convicted of multiple misdemeanor offenses.

Generally, misdemeanors "are not infamous offenses. They are, however, infamous if one convicted thereof is subject to an infamous punishment." *Eisner* v. *Commonwealth,* Ky., 375 S.W.2d 825 (1964). Statutory misdemeanors "do not belong to that class of crimes which are declared to be infamous." *Id.* In *Austin* v. *United States*, 509 U.S. 602 (1993), the United States Supreme Court established three factors for consideration of whether a penalty violates the Eighth Amendment. Kentucky courts have adopted these "factors" for purposes of Kentucky Constitution, Section 17 analysis. *Commonwealth* v. *Fint,* Ky., 940 S.W.2d 896 (1997). *See, Brown* v. *Commonwealth,* Ky., 818 S.W.2d 600 (1991); *see also, Covington* v. *Commonwealth,* Ky. App., 849 S.W.2d 560 (1992). The factors for determining Eighth Amendment and Section 17 violations are:

1. The gravity of the offense and the harshness of the penalty imposed;
2. The sentences imposed upon other criminals in the same jurisdiction;
3. The sentence imposed for commission of the same crime in other jurisdictions.

The gravity of the offense of cruelty to animals in the second degree is a misdemeanor. Misdemeanors are gen-

erally regarded as petty offenses. They are not the sort of crimes regarded as "infamous." "They are, however, infamous if one convicted thereof is subject to an infamous punishment." *Eisner,* 375 S.W.2d at 826. Twelve months in jail coupled with fines in excess of twenty-six thousand dollars is a harsh penalty compared to the gravity of the offense.

Finally, assuming *arguendo* (but not conceding) that the punishment imposed on the Petitioner is *technically* within the bounds prescribed by statute, this Court must still declare the penalty in this case to be in violation of the Constitution of the United States and of the Commonwealth of Kentucky.

> However, we have recognized that the court does have the power to declare a penalty unconstitutional if it clearly and manifestly appears to be so. *Weber* v. *Commonwealth, Ky.,* 303 Ky. 56, 196 S.W.2d 465. We have said the fixing of a penalty for crime is a legislative function and the question of what constitutes an adequate punishment is one left to the legislature. **However, this was surely written with the proviso in mind that this court retains the power to determine whether or not an act of the legislature violates the provisions of the Constitution** and even though constitutional provisions against cruel and inhuman punishment are generally directed to the kind of punishment distinguished from its duration **there nevertheless can be sentences so disproportionate to the offense committed as to shock the moral sense of the community. When this occurs the punishment would seem to fall within the prohibition of section 17 of the Constitution of Kentucky.** *Workman* v. *Commonwealth,* Ky. App., 429 S.W.2d 375, 377 (1968) (*emphasis added*).

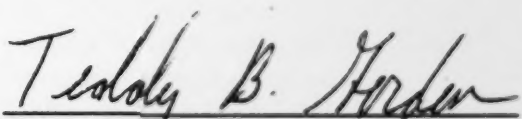
Petitioner simply contends that the total aggregate amount of fines that can lawfully be imposed on her are a $500 maximum fine for misdemeanor convictions, a $100

maximum fine for failure to license dogs, a $100 maximum fine for failure to vaccinate dogs, and a $250 maximum fine for failure to obtain a city business license, for a total of $950.

CONCLUSION

Petitioner herein respectfully requests the Honorable Supreme Court of the United States to grant a writ of certiorari in this matter to protect her from being victimized again in these proceedings. This nearly five (5) year litigation run has depleted the resources of the Petitioner, who has already been victimized by ineffective assistance of counsel at the trial of this matter. Petitioner now stands to be victimized again, both penitently and financially, by the ambiguity of the trial court's orders as well as the existing statutes and case law now in dispute. Petitioner's personal liberties and due process have been infringed upon in the prosecution of this matter. The Supreme Court of the United States should grant review of these matters in a published opinion to once and for all settle the discrepancies involved in misdemeanor sentencing, both statutorily and in the case law, and to issue a determinative finding upon what constitutes excessive punishment in misdemeanor sentencing.

Respectfully submitted,



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APPENDIX

APPENDIX A

SUPREME COURT OF KENTUCKY

2001-SC-463-D
(1999-CA-121-DG)

KARIN BRANDENBURG - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - *Respondent*

Hardin Circuit Court
1998-XX-8

ORDER DENYING DISCRETIONARY REVIEW

The motion for discretionary review of the decision of the Court of Appeals is denied.

ENTERED November 14, 2001.

/s/ [Illegible]
Chief Justice

APPENDIX B

RENDERED: MAY 11, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 1999-CA-000121-DG

KARIN BRANDENBURG - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

On Motion for Discretionary Review
From Hardin Circuit Court
Honorable T. Steven Bland, Judge
Action No. 98-XX-00008

OPINION—AFFIRMING

BEFORE: BARBER, COMBS, AND McANULTY, JUDGES, JUDGES.

BARBER, JUDGE: On October 1, 1997, the Appellant, Karin Brandenburg ("Brandenburg") was charged with 56 counts of second-degree cruelty to animals (KRS 525.130); 66 counts of failure to license dogs in her possession or control (KRS 258.135); 66 counts of failure to vaccinate dogs against rabies (KRS 258.015); and 264 counts of failure to obtain a business license (Radcliff City Ordinance, Chapter 10, §§ 35 and 55). The cases were tried in Hardin District Court on March 26 and March 27, 1999. The jury convicted Brandenburg of all charges, and returned the following penalties:

1. On the 56 cruelty to animal counts, "1.5 months per count for a total of 84 months and a fine of $200.00 per count for a total of $11,200.00."

2. On the 66 failure to license counts, "a fine of $50.90 per count for a total of $3,300.00"

3. On the 66 failure to vaccinate counts, "a fine of $100.00 per count for a total of $6,600.00"

4. On the 264 failure to obtain a business license counts, "a fine of $20.00 per count with 264 counts for a total of $5,280.00."

Post-trial, Brandenburg filed a motion requesting that the court amend her 84-month jail sentence to twelve months to conform with the one year cap on aggregate misdemeanor sentences under KRS 532.110(b). Brandenburg also moved that her 56 1.5 month sentences be run concurrently under *Stoker* v. *Commonwealth*, Ky., 828 S.W.2d 619 (1992).

By order entered April 10, 1998, the district court denied Brandenburg's motion to run her jail sentences concurrently under *Stoker, supra*, and granted the motion to cap her sentence at twelve months under KRS 532.110(b).

On April 13, 1999, the district court amended its April 10 order making it final and appealable. Brandenburg appealed to Hardin Circuit Court.

On appeal, Brandenburg argued: (1) that the multiple 1.5 month jail sentences should be run concurrently under *Stoker supra*, (2) that the $26,380 in total fines violated KRS 534.040(2)(a) (which provides for a maximum $500.00 fine for a single Class A misdemeanor conviction) and the Kentucky and United States Constitutional prohibitions against excessive fines. By order entered December 15, 1999, the Hardin Circuit Court affirmed the lower court's judgment. We granted Brandenburg's motion for discretionary review.

KRS 532.110(2) provides that "[i]f the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence which the defendant must serve." Brandenburg contends that the district court pronounced sentence on the cruelty to animals charge of "1.5 months for 84 months

total of 56 counts", following the conclusion of the March 27, 1999 trial. Brandenburg relies upon the district court's March 27, 1999 bench calendar entries. Brandenburg submits that sentences must be run concurrently, because the calendar entries do not specify the terms "consecutive" and/or "concurrent."

The subject calendar entry actually states "*jury finding* Sentence 1.5 months for 84 months total of 56 counts Cruelty 2d." (Emphasis added.) As we construe the entry, it simply notes the sentence the jury imposed, not that the court had actually imposed sentence on March 27, 1999. Brandenburg concedes that the trial court "orally reserved jurisdiction to 'review the sentence' on post-trial motions regarding consecutive versus concurrent sentencing." The trial court did not fail to specify whether Brandenburg's sentences were to run concurrently or consecutively; rather, the trial court merely reserved its ruling on the issue. The April 10, 1999 order clearly indicates the sentences were to run consecutively up to the 12-month aggregate limit imposed by KRS 532.110(1)(b), satisfying any KRS 532.110(2) concerns in this case.

Brandenburg also contends that the trial court failed to include a jury instruction regarding whether any of the multiple sentences were to run concurrently or consecutively. She seeks to persuade us that her 56 1.5 month sentences must be run concurrently under *Stoker* v. *Commonwealth, supra*. The issue was not preserved. Brandenburg fails to cite to the record showing any objection to the jury instruction. In fact, Brandenburg concedes that trial counsel did not object to the instructions and did not tender alternative instructions. Nevertheless, we will address Brandenburg's argument under the "palpable error" rule expressed in RCr 10.26.

In support of her position, Brandenburg relies principally upon *Stoker, supra*, a multiple felony case. There, the jury was only given the choice of recommending that either all or none of the multiple felony sentences be run consecutively. The jury ultimately recommended that all

the sentences be run consecutively. The Supreme Court held that, in felony cases involving multiple convictions, instructions must provide the jury with the option of running all, none, or any combination of multiple sentences consecutively. The Supreme Court directed that all of Stoker's sentences should be run concurrently, to remedy the error.

Here, the only conviction resulting in a sentence of incarceration was the second-degree cruelty to animal charge. The Completed "Form Verdict No. 1" stated as follows:

> We, the jury, find the Defendant guilty of *56* counts of Second-Degree Cruelty to Animals under Instruction No. 1 and fix her punishment at *1.5 months per count for a total of 84 months and a fine of $200.00 per count for total of $11,200.*[1]

Brandenburg is not entitled to relief under the palpable error standard as set forth in RCr 10.26. Under this rule, an error is reversible only if a manifest injustice has resulted from the error. If, upon consideration of the whole case, there is not a substantial possibility the result would have been different, the error will be deemed nonprejudicial. *Jackson* v. *Commonwealth*, Ky. App., 717 S.W.2d 511 (1986); *Graves v. Commonwealth*, Ky., 17 S.W.3d 858, 864 (2000).

The jury fixed Brandenburg's punishment at "1.5 months *for a total* of 84 months." Brandenburg states in her brief, "[f]rom the verdict form, it is clear that the jury intended to sentence the Appellant to eighty-four months in the county jail[.]" We agree. Moreover, the trial court capped Brandenburg's sentence at 12 months in accordance with KRS 532.110(1) (b). Thus, Brandenburg was not prejudiced by the trial court's failure to give a *Stoker* instruc-

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[1] On the jury verdict form, "guilty" was circled and the underlined portions were handwritten.

tion. Had such an instruction been given, Brandenburg would have inevitably received a 12-month sentence.

Brandenburg also contends that the circuit court erred in affirming the district court's imposition of $26,380.00 in fines. Brandenburg argues that the fines are excessive and violate KRS 534.040, Amendment VIII of the United States Constitution, and § 17 of the Kentucky Constitution.

First, we consider whether the fines violate KRS 534.040.

> (1) Fines and imprisonment for misdemeanors shall not be mutually exclusive. In any case where imprisonment is authorized, a fine may be levied in addition to the imprisonment, or a fine may be levied as an alternative to imprisonment. Similarly, a fine may be levied in lieu of imprisonment. Whether the fine is to be levied as the sole penalty or as an additional or alternative penalty shall be in the discretion of the judge or jury as the case may be. If the trial is by jury, the jury shall have the discretion. This rule shall apply in all cases where a fine is not the exclusive penalty authorized by law.
>
> (2) Except as otherwise provided for an offense defined outside this code, a person who has been convicted of any offense other than a felony shall be sentenced, in addition to any other punishment imposed upon him, to pay a fine in an amount not to exceed:
>
> (a) For a Class A misdemeanor, five hundred dollars ($500);
>
> (b) For a Class B misdemeanor, two hundred fifty dollars ($250) ; or
>
> (c) For a violation, two hundred fifty dollars ($250).

KRS 534.040 does not, on its face, impose a cap on the aggregation of misdemeanor fines. This is in stark contrast to the provision in the immediately preceding statute, KRS 534.030(3), which provides:

> [w]hen a defendant is convicted of two (2) or more felonies committed through a single act and is sentenced to fines pursuant to subsection (1), the aggregate amount of the fines shall not exceed ten

thousand dollars ($10,000) or double the amount of the defendant's gain from commission of the offenses, whichever is the greater.

In interpreting statutes, this Court must "ascertain and give effect to the intention of the Legislature . . . ." *Moore* v. *Alsmiller*, 289 Ky. 682, 686-687; 160 S.W.2d 10, 12 (1942). The intention "must be determined from the language of the statute itself if possible." *Id.* Where legislation includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that the legislature acted intentionally and purposefully in the disparate inclusion or exclusion. *Keene Corp.* v. *United States*, 508 U.S. 200, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993); *Russello v. United States*, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). KRS 534.040 does not provide for an aggregate limit upon multiple misdemeanor fines for misdemeanor convictions committed through a single act, unlike KRS 534.030(3), dealing with felonies. The commentary to KRS 534.040 states, that the misdemeanor fine scheme differs from the felony fine scheme because "fines for misdemeanors are generally more useful and appropriate for purposes of deterrence than are fines for felonies." We conclude that the legislature did not intend to place a cap in the case of multiple misdemeanor fines.

Brandenburg also argues that the fines are excessive, in violation of § 17 of the Kentucky Constitution and Amendment VIII to the United States Constitution. Section 17 of the Kentucky Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted." The VIII Amendment of the United States Constitution contains essentially identical language.

Workman v. *Commonwealth*, Ky., 429 S.W.2d 374, 378 (1968), applies a test to determine whether fines are excessive -whether the punishment shocks the general conscience of society today and is intolerable to fundamental fairness.

Commonwealth v. *Fint*, Ky., 940 S.W.2d 896, 898 (1997), adopts the three-prong analysis from *Solem* v. *Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983): (1) the gravity of the offense and harshness of the penalty; (2) the sentences imposed upon other criminals in the same jurisdiction; and (3) the sentences imposed, for commission of the same crime in other jurisdictions. In other cases, Kentucky courts have noted that § 17 of the Constitution of Kentucky is a constitutional limitation on the Legislature, in fixing punishment by statute, that is not applicable to punishment set by a jury so long as it does not exceed the statutory limits. *Bradley* v. *Commonwealth*, 288 Ky. 416, 156 S.W.2d 469 (1941); *McElwain* v. *Commonwealth*, 289 Ky. 446, 159 S.W.2d 11 (1942); *Weber* v. *Commonwealth*, 303 Ky. 56, 196 S.W.2d 465 (1946); *Monson* v. *Commonwealth*, Ky., 294 S.W.2d 78, 80 (1956). However, the courts do have the power to declare a penalty unconstitutional, if it clearly and manifestly appears to be so. *Weber, supra.*

Brandenburg was convicted of 452 counts involving the violation of four distinct statutes and ordinances. Obviously, in considering whether there is any violation of the excessive fines clause, the matter must be considered in this context, and not as a $26,380.00 fine for a single act.

Second-degree cruelty to animals in violation of KRS 525.130, is a Class A misdemeanor, which carries a maximum fine of $500.00. KRS 534.040(2) (a). There is no statutory requirement that multiple misdemeanor fines be capped. Brandenburg received a $200.00 fine for each of the 56 convictions, totaling $11,200.00. We cannot agree with Brandenburg that the fines were excessive. The fine imposed per cruelty conviction was only 40 percent of the maximum allowed by statute. Considering the conditions in which Brandenburg kept the animals, the fines were not fundamentally unfair, nor do they shock the conscience.

Brandenburg was also convicted of 66 counts of failure to license a dog, a violation of KRS 258.135. The penalty for violation of the statute is $5.00 to $100.00 per violation and imprisonment from 5 to 60 days, or both. Brandenburg

was fined $50.00 per count, for a total of $3,300.00 in fines. The fines were well within the amount permitted by statute, and in no way shock the conscience, or violate state and federal prohibitions against excessive fines.

Brandenburg was convicted of 66 counts of failure to vaccinate a dog for rabies, a violation of KRS 258.015. KRS 258.990 specifically provides that each day of violation shall constitute a separate offense and that the fine per conviction shall be not less than $10.00 per day nor more than $100.00 per day. Although KRS 258.990 provides that each day constitutes a separate violation, Brandenburg was charged with only one day of violation per dog. Under the circumstances, the $6,600.00 in fines for failure to vaccinate was not excessive.

Finally, Brandenburg was convicted and fined $20.00 per violation for 264 violations of Radcliff's business license ordinance. A $20.00 per day fine for failure to properly obtain a business license is not constitutionally excessive.

The judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:
Timothy Denison
Louisville, Kentucky
Gregory I. Thompson
Elizabethtown, Kentucky

ORAL ARGUMENTS FOR APPELLANT:
Timothy Denison
Louisville, Kentucky

BRIEF FOR APPELLEE:
Albert B. Chandler III
Attorney General
Elizabeth A. Heilman
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENTS FOR APPELLEE:
Elizabeth A. Heilman
Frankfort, Kentucky

APPENDIX C

HARDIN CIRCUIT COURT

DIVISION I

Case No. 98-XX-00008

KARIN BRANDENBURG - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From the Hardin District Court,
Radcliffe Division
Case No. 97-M-01140
The Hon. Kimberly W. Shumate, Presiding Judge

AFFIRMING

Karin Brandenburg was convicted by a jury in the Hardin District Court, Radcliff Division, on March 27, 1998 of 56 counts of Second-Degree Cruelty to Animals; 66 counts of Failure to License Dogs in her Possession or Control; 66 counts of Failure to Vaccinate Dogs against Rabies; and 264 counts of Failure to Obtain a City Business License. As part of its verdict, the jury recommended the following penalties:

56 counts Second-Degree Cruelty to Animals at "1.5 months per count for a total of 84 months and a tine of $200.00 per count for a total of $11,200.00"

66 counts Failure to License Dogs in her Possession or Control at "a tine at $50.00 per count for a total of $3300.00."

66 counts Failure to Vaccinate Dogs against Rabies at "a fine of $100.00 per count for a total of $6600.00."

Failure to Obtain a City Business License at "$20.00 per count with 264 counts for a total of $5280.00."

Following the return of the jury's verdict, the trial court sentenced the Defendant in accordance with that verdict. However, the trial court ordered that a hearing be scheduled for April 8, 1998 to consider matters in conjunction with final sentencing. Said hearing was held, after which the trial court sentenced the Defendant to one year in the Hardin County Jail and imposed total tines of $26,380.00, the final Amended Sentencing Order being entered on April 13, 1998.

Defendant now appeals to this Court. Defendant advances two arguments on appeal. First, Defendant argues that the trial court incorrectly instructed the jury by failing to include an instruction asking the jury for a specific recommendation as to whether any or all of the counts should be served consecutively or concurrently. Second, the Defendant argues that just as the trial court is limited in the total amount of jail time the court can impose, regardless of the number of offenses, likewise the trial court is similarly restricted with respect to the maximum amount of fines it can impose, regardless of the number of offenses.

Unfortunately for the Appellant, however, she has failed to preserve the issue of improper jury instructions for appellate review.

Criminal Rule 9.54 (2) states as follows:

> No party may assign as error the giving or failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

The Court has reviewed the audio tape record and has determined that at no time prior to the giving of the jury instructions by the trial court did the Defendant make any objection whatsoever to the jury instructions. The Defendant acknowledges this fact in her Statement of Appeal. Likewise, the record does not reveal, and the Defendant does not claim, that she tendered to the trial court any

jury instructions setting forth the instruction in controversy. Neither did the Defendant make a motion for a new trial. Thus Defendant did not do any of the things required by RCr 9.54(2) to preserve the question of improper jury instructions for appellate review. Therefore, the alleged error of the trial court with respect to the jury instructions has not been preserved and will not be considered by this Court. *Tamme* v. *Corn.*, Ky., 973 S.W.2d 13 (1998); *Blades* v. *Com.*, Ky. 957 S.W.2d 246 (1997); *Chumbler* v. *Corn.*, Ky., 905 S.W.2d 488 (1995). Neither does this matter constitute palpable error under RCr 10.26. *Moss* v. *Corn.*, Ky., 949 S.W.2d 579 (1997); *Newcomb* v. *Com.*, Ky. App., 964 S.W.2d 228 (1998).

Even if this matter had been properly preserved, the Court would not disturb the trial court's ultimate sentence of twelve months in the Hardin County Jail, inasmuch as the trial court correctly reduced the 84 month sentence recommended by the jury to the statutory maximum allowable in district court. KRS 532.110(1)(b); *Young* v. *Com.*, Ky., 968 S.W.2d 670 (1998). Furthermore, the Court believes that the clear, plain language of KRS 532.055 establishes that the requirement for a jury recommendation as to consecutive or concurrent sentences applies only to felony cases. The statute is entitled *Verdicts and sentencing by jury in felony cases* and the first words of the first sentence of the first paragraph of the statute state *In all felony cases. . .* When the language of a statue is clear and unambiguous, the statute must be interpreted and enforced in accordance with that clear and unambiguous language. *Sutherland* v. *Corn.*, Ky., 910 S.W.2d 235 (1995); *Terhune* v. *Corn.*, Ky. App., 907 S.W.2d 779 (1995). The language of KRS 532.055 is clear and unambiguous that it applies only to felony cases.

Appellant's reliance on *Stoker* v. *Corn.*, Ky., 828 S.W.2d 619(1992) is clearly misplaced. *Stoker* deals specifically with the jury instruction requirements as created by KRS 532.055, which as pointed out above, is a felony sentencing statute. Also, in *Stoker* the appellants had specifically ob-

jected to the jury instructions at the trial level, whereas in the case *sub judice* the Appellant did not. Interestingly enough, our Supreme Court noted in *Stoker* that in the absence of KRS 532.055, KRS 532.110 granted trial judges discretion to make decisions as to whether to run sentences consecutively or concurrently, subject only to the principles set forth in the statute (KRS 532.110). This is a misdemeanor case to which KRS 532.055 does not apply. The trial judge correctly sentenced the Defendant in accordance with all applicable statues and case law.

The Appellant's second argument is that the tines recommended by the jury and imposed by the trial court are excessive and violative of Section Seventeen of the Kentucky Constitution, which prohibits excessive fines. Appellant also argues that since KRS 534.030 places a maximum limit on fines for felonies, and since KRS 534.050 has a maximum limit on fines committed by a corporation, the legislature has surely evidenced an intent to cap individual misdemeanor fines in accordance with the limits set forth in KRS 534.040.

Section Seventeen of the Kentucky Constitution states as follows;

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted.

To be in violation of this section, the penalties must be manifestly excessive and cruel. *Harper* v. *Commonwealth*, 93 Ky. 290, 14 K.L.R. 163, 19 S.W. 737 (1892); See *Fry* v. *Commonwealth*, 166 Ky. 670, 179 S.W. 604 (1915); *Lakes* v. *Goodloe*, 195 Ky. 240, 242 S.W. 632 (1922). In order for a sentence to constitute cruel and unusual punishment, it must shock the moral sense of the community. *Workman* v. *Commonwealth*, Ky., 429 S.W.2d 374 (1968). The fines in this case were recommended by a jury of six citizens of Hardin County who heard the evidence and specifically recommended that the fines be imposed consecutively for each of the offenses for which Appellant was convicted. This same jury also recommended that the Appellant served a total of 84 months (seven years) in jail for those same

offenses. The nature of the offenses and the sheer number of offenses committed, and the resulting recommendation of penalties made by the jury, can hardly be said to have shocked the moral conscience of the community. Indeed, a good argument can be made that it was the actions of the Appellant which shock the morals of the community, and certainly not the verdict of the jury. The Court does not find that Section Seventeen of the Kentucky Constitution has been violated by the trial court's imposition of fines in this case.

Likewise, the Court does not find any legislative intent to limit misdemeanor tines as suggested by Appellant. The fact that the legislature did limit felony fines (KRS 534.030) and misdemeanor tines for corporations (KRS 534.050) by explicit statutory language, but failed to included any such language in the misdemeanor fines statue (KRS 534.040) much more likely implies that the legislature did not intend to limit misdemeanor tines. The legislature specifically limited the maximum amount of jail time that an individual can serve for multiple misdemeanor offenses (KRS 532:110(1)(b)). The legislature specifically limited the maximum imposition of fines in felony cases and misdemeanor cases where the defendant is a corporation. The legislature could easily have imposed a limit on misdemeanor fines in KRS 534.040 *if it had wanted to.* The absence of any such limiting language, when it is present in statutes all around it, is to this Court evidence of legislative intent not to limit misdemeanor fines. As noted in the Commentary to the Penal Code, *fines for misdemeanors are generally more useful and appropriate for purposes of deterrence than are fines for felonies.* To maximize deterrent value, the trial court is not restricted by statute or case law in determining whether fines are to be imposed cumulatively or concurrently.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the verdict of the Hardin District Court wherein the Appellant was found guilty of 56 counts of Cruelty to Animals Second Degree; 66 counts of Failure to

Vaccinate Dog again Rabies; 66 counts of Failure to License Dogs; and 264 counts of Failure to Obtain a City Business License, and the subsequent penalties as imposed by the trial court of twelve months in the Hardin County Jail and fines in the amount of $26,380.00 is AFFIRMED.

This 15th day of December, 1998.

/s/ T. Steven Bland, Judge
Hardin Circuit Court
Division I

Entered: December 15, 1998

Attest: Ralph Baskett, Clerk
Hardin Circuit Court

APPENDIX D

HARDIN CIRCUIT COURT

RADCLIFF DIVISION

97-M-01140

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

KARIN BRANDENBURG - - - - - *Defendant*

AMENDED SENTENCING ORDER

Upon the Court's own motion, the Order of April 9, 1998 is hereby amended as noted herein to specifically state that the Sentencing Order is final and appealable. All other provisions of the Order of April 9, 1998 shall stand unchanged:

ORDER

Pursuant to the Findings of Fact and Conclusions of Law herein, IT IS HEREBY ORDERED THAT:

(1) Karen I. Brandenburg is sentenced to the maximum misdemeanor imprisonment penalty of one year in the Hardin County Jail.

(2) Karen I. Brandenburg shall pay court costs and shall pay fines in the amount of $26,380 pursuant to the jury verdict as follows:

* $11,200 for Second-Degree Cruelty to Animals

* $3,300 for Failure to License Dogs in Her Possession or Control

* $6,600 for Failure to Vaccinate Dogs against Rabies

* $5,280 for Failure to Obtain a City Business License.

(3) Karen I. Brandenburg's appeal bond is set at $25,000 full cash or $50,000 property bond to be posted within the constraints specifically set forth in this Order.

(4) The motions for forfeiture and restitution are set for evidentiary hearing on April 27, 1998 at 10:00 a.m.

/s/ Kimberly Winkenhofer Shumate
Kimberly Winkenhofer Shumate
Hardin District Judge
Radcliffe Division

Entered: April 13, 1998

APPENDIX E

HARDIN CIRCUIT COURT

RADCLIFF DIVISION

97-M-01140

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

KARIN BRANDENBURG - - - - - *Defendant*

ORDER

Upon motions of each party regarding post-trial matters, the Court makes the following Findings of Fact and Conclusion of Law:

1. *Forfeiture of Animals and Restitution for Cost of Boarding and Medical Care.* These matters are set for evidentiary hearing on April 27, 1998 at 10:00 a.m. Defendant shall notify each owner whom she alleges to claim ownership of an animal which has been held by the Commonwealth and which the Commonwealth desires be forfeited to the State of the pendency and hearing on said motion.

2. *Appellate Bond.* Defendant's bond prior to trial was set at $25,000 with the allowance of the posting of 10% cash. This original bond was obviously set with the presumption of innocence in place. Now that a jury has found Defendant guilty on all charges, the presumption of innocence no longer prevails. The Court believes that a full cash bond posting is appropriate.

Defendant requests that the Court consider the posting of a property bond equivalent The Court believes that it is appropriate to allow some form of property bond to be posted and hereby orders that a $50,000 property bond may be posted for the release of the Defendant during the pendency of the appeal. However, it is specifically found

that if the Defendant desires to use either the Property at 699 Park Lane, Radcliff or at 861 Seminole Drive, Radcliff as the underlying equity for the posting of the bond, then the typical PVA tax accessed value may not be used as the value of the property for determining equity for purposes of bond. As the court has seen considerable footage of the current condition of each of the properties during the trial of this matter, there is grave doubt that a typical tax assessed value would reflect the actual current appraised value on the open market. If the Defendant desires to use either of these properties as the basis for a property bond for purposes of appeal bond, she must procure a reliable, independent appraisal by a certified appraiser to use as the value for determining what, if any, equity exists in these properties, and requests by written motion with notice to the Hardin County Attorney that this Court specifically review the adequacy of such proposed posting of property bond.

Further, if any of the property desired to be used as the basis for a property bond is owned by the Defendant's mother, then Defendant shall provide competent evidence that Defendant's mother has the requisite capacity to consent to the use and encumbrance of the property for the purpose of bonding. If the Defendant holds a power of attorney for her mother, she may not use that power of attorney to grant consent for use of the property for her own benefit. These requirements are based on the evidence presented by the Defendant at trial that her mother has been diagnosed with Alzheimers and is in failing health, causing this Court to doubt the ability of her mother to consent to any encumbrance of property for the purposes of bonding or any other purpose or conveyance.

3. *Concurrent* v. *Consecutive Sentencing Pursuant to KRS 532.055.* The Defendant argues that the Court should have instructed the jury regarding a recommendation concerning whether any proposed sentence should run concurrently or consecutively and that failure to do so is reversible error and requires that the sentences be imposed

concurrently, resulting in a jury sentence of 1.5 months service.

The Court is not persuaded by this argument for several reasons:

(A) It is correct that no written jury instruction was given regarding the request for a recommendation by the jury on the issue of concurrent v. consecutive sentencing. In the opinion of this Court, KRS 532.055(2) does not require such an instruction in a misdemeanor case. The statute clearly begins, "In all felony cases..." and is likewise titled "Verdicts and sentencing in felony cases." It is not surprising then that the case cited by Defendant, *Stopher* v. *Commonwealth* 828 S.W.2d 619 (Ky. 1992), was therefore a felony sentencing case. No misdemeanor sentencing cases can he found by this Court regarding the issue of jury recommendation for concurrent v. consecutive sentencing

(B) If KRS 532.055 were to be found to apply to misdemeanor cases, it is found that the request of the jury in instructions is strictly a recommendation and does not take away from the trial court the obligation for imposition of final sentencing. The Court has not yet entered final sent sentencing until consideration of the motions of counsel within this Order and therefore has taken into account the jury recommendation.

(C) If KRS 532.055 were to be found to apply to misdemeanor cases, it is found that counsel for the Defendant did not object to the proposed instructions and did not request that the jury make any such particular recommendation and that therefore any such request at this late date is untimely and will not be considered.

(D) If KRS 532.055 were to be found to apply to misdemeanor cases, it is found that while the written jury instructions did not address the specific issue of a recommendation of concurrent v. consecutive sentencing, the oral admonition of the jury following the question of the foreman regarding the issue of penalty satisfies any request of the jury for recommendation.

(E) If KRS 532.055 were to be found to apply to misdemeanor cases, it is found that while the jury instructions did not in writing request a specific recommendation concerning concurrent v. consecutive sentencing, that the jury did in fact make such a recommendation by the very language of the Jury Interrogatories and Form Verdict responses. The jury's language clearly indicates the recommendation of the jury that the Defendant serve "1.5 months per count for a total of 84 months."

4. *Maximum Misdemeanor Sentence Pursuant to KRS 532.110*

(A) The Defendant argues that there was no finding by the Court at sentencing specifying the manner in which the sentence was to run (i.e. concurrent v. consecutive) and that therefore pursuant to KRS 532.110(2) absent a finding the sentence shall run concurrently, requiring the Defendant to serve only a total of 1.5 months. This proposition is misplaced on the facts of this case for two reasons:

(1) The Court at the conclusion of the jury trial sentenced the Defendant to 84 months in the Hardin County Jail in accordance with the jury verdict with the specific condition that the sentence would be reviewed on post-trial motions regarding the issue of concurrent v. consecutive service and the maximum penalty available and even set the hearing date for any such motions for April 8, 1998, at the time of acceptance of the jury sentence. Therefore, final sentencing had not been made until this Order and the facts do not support the Defendant's contention that the issue was not addressed at sentencing and that therefore there must be a presumption of concurrent for a sentence of 1.5 months.

(2) The initial sentencing subject to post-trial motions was for I .5 months on each of 56 counts for an 84 month sentence, obviously a consecutive sentence as recommended by the specific language of the jury and was clearly addressed at that time. There can be no argument that the issue was not addressed by the Court.

(B) The Defendant argues that the jury's recommendation for 84 months cannot be upheld as it is in direct contravention of KRS 532.110(i)(b) which states that in no circumstances that the aggregate of definite terms (misdemeanor sentences) cannot exceed one year. The Defendant cites *Hardy* v. *Commonwealth,* 590 S.W.2d 879 which succinctly states that KRS 532.11O(a)(b) means what it says: The aggregate of consecutive definite terms (misdemeanor sentences) shall not exceed one year." The case states that "there appears so be no ambiguity in what this court perceives to be clear expression of legislative intent." This case has never been overturned and no other case can be found by the Court to contradict the plain and simple reading of the sentencing within a misdemeanor case.

Confusion to the lay person, jurors and the general public, could easily result in attempting to reconcile why the statutes setting out an offense, such as Cruelty to Animals, would specify that certain acts are each separate counts and that each separate count can carry penalties and that the jury can fix punishment at a consecutive sentence for each of these counts, but that the Court must later overrule the recommendation. While the logic may not be obvious, the clear statutory language is. This Court is compelled by the direct legislative language and intent to adhere to the recommendation of the jury regarding the issue of consecutive sentences of 1.5 months times 56 counts, but to cap the time of service pursuant to KRS 532.110(b) at the maximum for a misdemeanor of a one year sentence.

ORDER

Pursuant to the Findings of Fact ad Conclusions of Law herein, IT IS HEREBY ORDERED THAT:

(1) Karen I. Brandenburg is sentenced to the maximum misdemeanor imprisonment penalty of one year in the Hardin County Jail.

(2) Karen I. Brandenburg shall pay court costs and shall pay fines in the amount of $26,380 pursuant to the jury verdict as follows:

* $11,200 for Second-Degree Cruelty to Animals

* $3,300 for Failure to License Dogs in Her Possession or Control

* $6,600 for Failure to Vaccinate Dogs against Rabies

* $5,280 for Failure to Obtain a City Business License.

(3) Karen I. Brandenburg's appeal bond is set at $25,000 full cash or $50,000 property bond to be posted within the constraints specifically set forth in this Order.

(4) The motions for forfeiture and restitution are set for evidentiary hearing on April 27, 1998 at 10:00 a.m.

This 9th day of April, 1998.

/s/ Kimberly Winkenhofer Shumate
Kimberly Winkenhofer Shumate
Hardin District Judge
Radcliffe Division

APPENDIX F

16

CALENDAR

COUNTY: HARDIN/RADCL
COURT : DISTRICT
JUDGE : HON. KIMBERLY WINKENHOFER SHUMATE

DATE : 03/27/98
TIME : 8:30 am

CASE: 97-M-01140 SSN: 403-58-3423 DOB: 05/17/42
BRANDENBURG, KAREN I. , COMMONWEALTH VS. -

COMPLAINING WITNESS: ENNIS, SAM RPD

1-5 6 cts Cruelty 2d
5-7-125 6 cts Dog kill.
120-180 3 cts Dog kill

Then Middleton Clerk to enter in 5 cts, 6 cts, 6 cts

EVENT : JURY TRIAL

CHARGE 1 ORIGINAL 525130 CRUELTY TO ANIMALS 2ND DEGREE

PROCEEDINGS : Resume jury trial at 8:30a.m. 4 cert. of Comm. case jury finding. Sentence 1.5 months for 4 counts total 6 counts Cruelty 2nd fine $3,300 for 6 cts. Forfeiture + fine of $1,800 for 6 cts failure to vacc.

CHARGE 2 ORIGINAL 525130 CRUELTY TO ANIMALS 2ND DEGREE

PROCEEDINGS : Release the 5 dogs belonging to Donna Brandenburg Other (1 mother + 3 pups of Tibetan breed + Elliott all Tibetan) Motion for forfeiture cont. to 4/3/98 9AM for hearing

CHARGE 3 ORIGINAL 525130 CRUELTY TO ANIMALS 2ND DEGREE

PROCEEDINGS :

Fine $5,22 for 26 4 ct dog of felon bus fac TNN c

6/3/98 s

CHARGE 4 ORIGINAL 525130 CRUELTY TO ANIMALS 2ND DEGREE

PROCEEDINGS :

CHARGE 5 ORIGINAL 525130 CRUELTY TO ANIMALS 2ND DEGREE

PROCEEDINGS :

CHARGE 6 ORIGINAL 525130 CRUELTY TO ANIMALS 2ND DEGREE

PROCEEDINGS :

CHARGE 7 ORIGINAL 525130 CRUELTY TO ANIMALS 2ND DEGREE

PROCEEDINGS :

CHARGE 8 ORIGINAL 525130 CRUELTY TO ANIMALS 2ND DEGREE

CASE CONTINUED ON NEXT PAGE

JUDGE SIGNATURE : Kimberly Winkenhofer Shumate

DATE : 3/27/98

Exhibit #5

BEST AVAILABLE COPY